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IN THE

Supreme Court of the United States

October Term, 1971

No. 1429

RICHARD F. FINCKE and ALBERT A. PRATA,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION (WITH APPENDICES) FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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RICHARD F. FINCKE and ALBERT A. PRATA,
Petitioners,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION (WITH APPENDICES) FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, Richard F. Fincke and Albert A. Prata, pray that a writ of certiorari be issued to review the final judgment of the United States Court of Appeals for the Second Circuit, entered in the office of the clerk of that court on February 1, 1971.

Opinions Below

The United States District Court for the Southern District of New York entered a judgment of conviction after a six-day trial before the Hon. Morris E. Lasker, United States District Judge and a jury. It is reproduced as Appendix I, *infra,* pp. A1-A4.

The United States Court of Appeals for the Second Circuit affirmed the conviction of the District Court on February 1, 1971. Its opinion is reproduced as Appendix II, *infra,* pp. A5-A17; and its judgment as Appendix III, *infra,* pp. A18. This opinion is not yet reported.

Jurisdiction

Petitioners seek review of the decision of the United States Court of Appeals for the Second Circuit entered on February 1, 1971 affirming the convictions of petitioners for violations of 18 U.S.C. §§1343 and 371.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Question Presented

1. Whether the charges against the petitioners were so totally devoid of evidentiary support as to render the convictions unconstitutional under the due process clause of the Fifth Amendment.

Constitutional, Statutory and Other Provisions Involved

1. United States Constitution, Fifth Amendment

* * * nor be deprived of life, liberty, or property without due process of law; * * *

2. Title 18, United States Code, §1343

Fraud, by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or

property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

3. Title 18, United States Code, §371

Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. * * *

Statement of the Case

The petitioners, Richard F. Fincke and Albert A. Prata, seek a writ of certiorari to review their judgments of conviction for violations of 18 U.S.C. §§1343 (wire fraud) and 371 (conspiracy to commit wire fraud).

The petitioners, along with a co-defendant Robert G. McCullough were tried in the United States District Court for the Southern District of New York before the Hon. Morris E. Lasker, United States District Judge, and a jury.

Trial commenced on February 11, 1970. On February 18, McCullough was acquitted by the court. On February

19, Fincke and Prata were found guilty on all counts by the jury.

The Court of Appeals for the Second Circuit affirmed the convictions on February 1, 1971.

The indictment charged the petitioners and McCullough with eleven counts of wire fraud and one count of conspiracy.

The essential elements of the wire fraud charge necessary for conviction are a finding that, first, the petitioners wilfully, intentionally and knowingly devised or intended to devise a scheme or artifice to defraud or to obtain money or property by false and fraudulent pretenses or representations and, secondly, that for the purpose of executing such scheme or artifice, they transmitted or caused signs, sounds or signals to be transmitted by wire communication in interstate commerce.

At the trial the government proffered the theory that Fincke and Prata, together with McCullough, devised such a scheme to defraud the New York Telephone Company by using the credit cards issued to the petitioners without any intention on their part to pay the charges. Over a period of five years those charges amounted to the incredible sum of $148,803.43.

In 1958 Richard Fincke started a business called Trans American Industries whose objective it was to build low-cost prefabricated housing in Puerto Rico and Panama.

Richard Fincke was president and ran the business. Martin Ribakoff was the only other active officer in the

corporation (J.A. 15a).* Petitioner Prata was not an officer in the corporation and his activity was described at trial as being in the nature of an office boy (J.A. 15a, 18a).

In connection with the business a telephone credit card was issued to Fincke for the telephone number HA 20010. Ribakoff and Prata were also authorized to use the card.

McCullough was the district manager of the telephone company branch office concerned with Fincke's account.

It was the government's position at the trial that McCullough as a member of the conspiracy had somehow hidden the delinquent account from his superiors at the telephone company or had misrepresented the status of the account in furtherance of the conspiracy.

Yet this theory is totally unfounded by the facts adduced at trial.

McCullough became the district manager at the telephone company's branch office in late 1961. Shortly thereafter he became aware that Fincke's account was in arrears to the extent of two or three thousand dollars and he asked an assistant to take care of it (J.A. 157a-59a).

Some three or four months later the delinquency had grown to eight or ten thousand dollars (J.A. 160a).

McCullough became concerned with the growing delinquency. He arranged a meeting with Fincke and Prata and at this meeting he pressed for payment of the account.

* References are to pages of the Joint Appendix in the Second Circuit.

But Fincke and Prata exhibited to McCullough blueprints, contracts and documents, all dealing with Trans American's building operations in Puerto Rico (J.A. 166a). Among the letters shown to him was a letter from the International Longshoreman's Union expressing interest in the project and indicating that the union was going to use their pension funds in order to back the project (J.A. 166a-67a). He was also shown a letter from the Federal Housing Authority indicating that it would insure the loans of Trans American (J.A. 167a).

Confronted with this impressive array of correspondence and Fincke's estimate that funds would be coming in within six months, McCullough agreed to continue the account on a credit basis (J.A. 169a).

During the ensuing months the arrears increased at the rate of three or four thousand dollars a month (J.A. 170a-171a) until in April of 1962 the account had reached 20 or 25 thousand dollars (J.A. 172a).

Again McCullough met with the petitioners, this time in June or July of 1962 (J.A. 175a). At this meeting Fincke advised McCullough that the project was coming along as expected and again McCullough extended the account on a credit basis (J.A. 174a).

From the time of this meeting until March of 1967, McCullough was in contact with Fincke and Prata forty or fifty times. During this time they showed him numerous documents concerning their project in Puerto Rico (J.A. 176a-78a). Fincke also referred to numerous other projects he was working on, including copper ventures and building

plans in Canada (Tr. 669-72).* Again McCullough continued their credit.

In early 1967, McCullough again pressed Fincke for payment, pointing out that he had put himself out on a limb for the petitioners in view of the enormous size of the bill. Fincke told McCullough that he was negotiating a deal to sell one Dr. Yandel's hospital to a very interested buyer, and that he expected a commission from the sale of around $100,000.00, of which a large part would be applied to the phone bill (J.A. 188a-89a).

Finally, the roof fell on McCullough. His immediate supervisor Donald Taliaferro, called McCullough on March 11, 1967, about the Fincke account. McCullough attempted to deceive Taliaferro in hopes that Fincke would soon be able to pay the account. In order to buy time and to save his job he made false statements and falsified company records during the next several weeks. Then in April 1967, McCullough was fired.

McCullough testified that the petitioners had never given him any improper inducement to extend credit to them, and that he never entered into any agreement with them to conceal their debt from the telephone company (J.A. 175a-76a).

McCullough admitted entering on Fincke's credit information card a statement that Dr. Yandel was connected with the account because he supposed him to be a partner of Fincke's (J.A. 225a-26a). McCullough did not testify that Fincke ever made such a claim.

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* References are to pages of the trial transcript.

When McCullough's testimony is scrutinized, it reveals unbelievably poor business judgment. It does not reveal a single false or fraudulent statement by Fincke or Prata with respect to anything. It merely reveals repeated statements by Fincke, based upon numerous, and very impressive documents, none of which the Government proved to be false, that he hoped to have funds in the future to pay his bill.

Any false representations or statements made to the telephone company were made by McCullough and then only and understandably to save his job.

After counsel for both sides presented their summation, the court acquitted McCullough, leaving to the jury the question as to whether petitioners had intentionally misrepresented themselves to an innocent and duped McCullough.

On this question the evidence adduced at trial failed totally to uphold the charges leveled at the petitioners.

Ribakoff, the only active officer of Trans American other than Fincke testified that a prefab building was sent down to Panama (Tr. 67) and that the plant was about 75% completed when the mortgage money failed to materialize and the plant was defaulted (Tr. 67).

Ribakoff could not remember Fincke telling McCullough anything specific about Trans American's business affairs, and could only remember Fincke saying that he was expecting to obtain funds so that the bill could be paid (J.A. 32a).

In his private conversations with Ribakoff, Fincke said that he was trying his best to raise funds to pay the bill (J.A. 36a) and expressed surprise that McCullough was able to continue his credit under the circumstances (J.A. 35a-36a).

Ribakoff gave no testimony indicating that Fincke's professions of good faith were insincere, or that any of the documents exhibited to McCullough were deceptive or fraudulent.

Yet the government paraded witness after witness in an attempt to color Fincke as a confidence man extraordinaire.

The government called Dr. Yandel, the owner of a hospital in Spring Valley, New York, and he testified to a source from which Fincke apparently hoped to obtain a large sum of money in early 1967 which might have been used to reimburse the telephone company.

He testified that Fincke stated that he had a party who was interested in purchasing the hospital. Fincke's brother was on the Board of Governors of a church that was interested in going into the hospital field (J.A. 55a-56a, 61a).

Although the sale never materialized (J.A. 61a), it was apparently nearly completed. Fincke's first prospective purchaser was the American Orthodox Catholic Church. There was a meeting at the church with the archbishop and his advisors including a judge, a lawyer, and an accountant. The deal did not go through, but Fincke's com-

mission could have been $65,000.00 to $90,000.00, had it done so. (J.A. 96a-97a).

Later in 1967 Dr. Yandel negotiated through Fincke with the Methodist Church of the Northern New Jersey Conference. Negotiations reached the point of discussion between the attorneys and accountants for the hospital and the church. The church was represented by Sherman & Sterling (J.A. 89a). The prospective sale agreement was placed in final form (J.A. 90a), but the deal was later rejected by Sherman & Sterling and the church's board of governors (J.A. 93a). There was an understanding in writing that Fincke was to be compensated if the deal went through (J.A. 92a).

During the middle of 1967, Fincke also arranged discussions between Dr. Yandel and the Seventh Day Adventist Church concerning the possibility that they might purchase a tract of land adjoining Dr. Yandel's hospital to erect nursing homes and similar buildings (J.A. 95a). This did not work out either.

Thus Fincke's optimistic representations to McCullough in early 1967 that he expected to acquire funds shortly through his commission on the sale of the hospital can in no way be categorized as fraudulent. Indeed, Fincke was still attempting to negotiate the sale of the hospital long after McCullough was dismissed from the telephone company. And it was strictly McCullough's misapprehension that Dr. Yandel was an associate of Fincke.

In addition the Government called various witnesses who testified to telephone calls allegedly made by the peti-

tioners including the calls alleged in counts 1-11 of the indictment. A number of these calls were made after Taliaferro testified that he told them their credit was cancelled. Yet it was established at the trial that Fincke was out of town when written notice of the cancellation was sent to him and it was also established that persons other than the petitioners were using their credit number without authority.

Reason for Granting the Writ

I

The charges against the petitioners were so totally devoid of evidentiary support as to render the convictions unconstitutional under the due process clause of the Fifth Amendment.

Infrequent though it may be, every so often a case arises where a conviction is based upon such a lack of evidentiary support as to affront due process.

Thompson v. *The City of Louisville,* 362 U.S. 199 (1960) was one such case and together with *Garner* v. *Louisiana,* 368 U.S. 157 (1961) are the leading cases on this constitutional issue.

And now another such case is *Fincke* v. *United States.* Just as in *Thompson* and *Garner,* the question that arises is not one of the sufficiency of evidence to support a conviction but "whether these convictions rest upon any evidence which would support a finding" that the petitioners intended to defraud the telephone company and entered

into a conspiracy to that end. *Garner* v. *Louisiana, supra,* at 163, 164.

Criminal intent and guilty knowledge are essential for convictions under 18 U.S.C. §1343. An examination of the record reveals such an utter lack of evidence of intent to defraud that one can only wonder how a guilty verdict was reached.

There was no proof of any false representations, no proof of scienter, no proof of reckless indifference to whether the representations were true or not, and there was no proof of conspiracy.

What is adduced from a reading of the record is that Fincke was a promoter who liked to deal in large numbers. Yet like all promoters, he ran the risk that his prospective deals might not materialize. His Trans American operation seemed well on its way. A plant in Panama had been 75% completed. Money arrangements seemed to have been set. And then the bottom fell out. He nearly completed the sale of the hospital, but that too failed. A platinum deal was offered to him by one De Lanzo. The platinum turned out to be lead (Tr. 347-48, 354).

And while he was operating from one deal to the next, he was ringing up a huge telephone bill. McCullough, whose responsibility was the Fincke account repeatedly pressed for payment and yet extended Fincke's credit on the strength of Fincke's impressive documentation of his pending operations. Not one of the representations made to McCullough were false, nor were they intended to misrepresent. They were all bona fide representations of deals from which Fincke expected to make a lot of money.

Keeping in mind that the crucial question is the defendant's state of mind in making such representations, the record bears out that Fincke never intended to defraud the telephone company. Fincke actually believed that his enterprises would turn a profit and his optimism had a reasonable basis.

Although the record is replete with testimony to the effect that Fincke and Prata made telephone calls on their credit cards, there is no evidence whatever of any intention to defraud. Thus these overt acts cannot be deemed criminal.

McCullough was the person who misrepresented the account to his superiors when he realized that his job was in jeopardy. Yet he could not hide the delinquency for it appeared on the telephone company's list of delinquent accounts month after month. This list was available to anyone in the telephone company and new credit cards were issued to the petitioners year after year despite the blatantness of the delinquency.

The petitioners' representations, then, were made in good faith without an intention to defraud and the Government not only failed to sustain its burden of proof, but could not offer any tangible evidence of fraud. Under such circumstances due process demands reversal. See *United States* v. *Sheiner*, 273 F.Supp. 977 (S.D.N.Y. 1967), *aff'd* 410 F.2d 337 (2d Cir. 1969).

As for Prata, although the indictment alleges that he together with Fincke controlled the affairs of Trans American, the evidence indicates that he was only the "office boy" (J.A. 18a).

There was no evidence that he had any knowledge about the genuineness or probable success of the Fincke projects. There was no evidence that Prata made any false statements to the telephone company. All that the testimony does reveal vis a vis Prata, is that he was with Fincke on several occasions when Fincke met with McCullough, and that he helped, on at least one occasion, to show McCullough some of Fincke's documents (J.A. 177a). This does not indicate that he knew anything other than what Fincke told him or that he knew anything more than McCullough himself was told. McCullough's testimony clearly indicates that Fincke was the person he was dealing with (e.g. J.A. 162a-68a, 173a-74a, 183a, 188a-90a, 192a).

The conviction of Prata was based on nothing more than mere speculation and, in line with *Thompson,* should at least be reason for granting the Writ sought herein.

In conclusion it would seem that petitioners' convictions were based upon mere speculation and not upon any evidence whatsoever. Insofar as Fincke is concerned, irrelevant testimony that he had not repaid certain other loans led the jury to speculate that all that Fincke said and did was a fraud, when in fact, the evidence was totally opposite. And assuming *arguendo* that Fincke's failure to repay certain loans was evidence of some other crime, it is as much a denial of due process to convict for a charge that was never made as it is to convict upon a charge for which there is no evidence to support that conviction. *Garner* v. *Louisiana,* 368 U.S. 157, 164 (1961).

The government's utter failure to prove any of Fincke's representations fraudulent together with McCullough's acquittal renders the charge that there existed a scheme to defraud the telephone company as incredible as the telephone bill involved herein. Furthermore, section 1343 was never intended to apply to those who simply run up telephone bills on a credit card. Rather the wire fraud section is an extension of the mail fraud sections, 18 U.S.C. §§1341, 1342, which just preceded it, and is aimed at those who would use the telephone for a fraudulent scheme.

Conclusion

The petitioners' convictions amount to a violation of the due process clause of the Fifth Amendment since there was absolutely no evidence to support them.

Respectfully submitted,

O. JOHN ROGGE
Attorney for Petitioners

Of Counsel:
O. JOHN ROGGE
RICHARD H. ROSENBERG

Appendix I

Judgment of the United States District Court for the Southern District of New York—Re: Albert A. Prata

SOUTHERN DISTRICT OF NEW YORK

No. 69 Cr. 545

UNITED STATES OF AMERICA

v.

ALBERT A. PRATA

On this 10th day of April, 1970, came the attorney for the government and the defendant appeared in person, and by counsel.

IT IS ADJUDGED that the defendant upon his plea of not guilty, and a verdict [illegible] a jury has been convicted of the offense of [illegible] ully and knowingly devising and attempting to devise a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises from the New York Telephone Company, (Title 18, United States Code, Secs. 1343 and 2); unlawfully, wilfully and knowingly conspiring so to do (Title 18, United States Code, Section 371) as charged in cts. 1 thru 12, inclusive and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

Appendix I—Judgment of the United States District Court Re: Albert A. Prata

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the imposition of prison sentence is suspended on each of counts 1 through 12 inclusive and the defendant is FINED the total sum of $2,500.00 to cover counts 1 through 12 inclusive. Defendant is placed on probation for a period of Two (2) YEARS, subject to the standing probation order of this Court. Fine is to be paid prior to expiration of the period of probation, or at such earlier date as the sentencing Judge may be satisfied upon report of the Probation Department that the defendant is financially capable of paying the fine.

IT IS FURTHER ORDERED that during the period of probation the defendant shall conduct himself as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

IT IS FURTHER ORDERED that the clerk deliver three certified copies of this judgment and order to the probation officer of this court, one of which shall be delivered to the defendant by the probation officer.

Morris E. Lasker
United States District Judge
John Livingston
Clerk

Appendix I

Judgment of the United States District Court for the Southern District of New York—Re: Richard F. Fincke

SOUTHERN DISTRICT OF NEW YORK

No. 69 Cr. 545

UNITED STATES OF AMERICA

v.

RICHARD F. FINCKE

On this 10th day of April, 1970, came the attorney for the government and the defendant appeared in person, and by counsel.

IT IS ADJUDGED that the defendant upon his plea of not guilty, and a verdict of guilty by a jury has been convicted of the offense of unlawfully, wilfully and knowingly devising and attempting to devise a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises from the New York Telephone Company, (Title 18, United States Code, Secs. 1343 and 2); unlawfully, wilfully and knowingly conspiring so to do (Title 18, United States Code, Section 371) as charged in cts. 1 thru 12, inclusive and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

Appendix I—Judgment of the United States District Court Re: Richard F. Fincke

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ONE (1) YEAR on each of counts 1 through 12 inclusive to run concurrently with each other and the defendant is FINED the sum of $625.00 on each of counts 1 through 12, inclusive. Total fine $7,500.00. Execution of prison sentence on each of counts 1 through 12 inclusive is suspended and the defendant is placed on probation for a period of Two (2) YEARS, subject to the standing probation order of this Court. Fine is to be paid prior to expiration of the period of probation, or at such earlier date as the sentencing Judge may be satisfied upon report of the Probation Department that the defendant is financially capable of paying the fine.

IT IS FURTHER ORDERED that during the period of probation the defendant shall conduct himself as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

IT IS FURTHER ORDERED that the clerk deliver three certified copies of this judgment and order to the probation officer of this court, one of which shall be delivered to the defendant by the probation officer.

Morris E. Lasker
United States District Judge
John Livingston
Clerk

Appendix II

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 195 & 196—September Term, 1970

(Argued October 22, 1970 Decided February 1, 1971.)

Docket Nos. 34936 & 34937

UNITED STATES OF AMERICA

Appellee,

v.

RICHARD F. FINCKE and ALBERT A. PRATA,

Defendants-Appellants.

Before:

MEDINA, WATERMAN and FEINBERG,

Circuit Judges.

Appeals from judgments of the United States District Court for the Southern District of New York, Morris E. Lasker, *Judge.*

Richard F. Fincke and Albert A. Prata appeal from judgments of conviction, entered upon the verdict of a jury, of violations of the Wire Fraud Statute, 18 U.S.C., Section

1343 and of conspiracy in violation of 18 U.S.C., Section 371. Affirmed.

HENRY PUTZEL, III, Assistant United States Attorney, New York, N. Y. (Jay S. Horowitz, Ross Sandler, Assistant United States Attorneys, and Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, New York, N. Y., on the brief), *for appellee.*

THOMAS DAY EDWARDS, New York, N. Y. *for defendants-appellants.*

MEDINA, *Circuit Judge*:

The widespread use of credit cards throughout the country seems to be one of the characteristic features of the American scene of today. And these credit cards have spawned a proliferation of old and new frauds and swindles. In this case credit cards used in connection with the placing of telephone calls ran up a bill of $148,803.43.

The indictment charges appellants Richard F. Fincke and Albert A. Prata with devising a scheme to defraud the New York Telephone Company by using the credit cards issued to the two appellants, as executives of Trans American Industries, Incorporated, without any intention of paying the charges. Robert G. McCullough, the District Manager in charge of the Broad Street office of the Telephone Company, is alleged to have participated in the scheme to defraud. All three are also charged with conspiracy. The evidence supporting the verdict against appellants both on the eleven substantive counts and also

on the conspiracy charge is abundant and convincing.[1] There would be no occasion for discussion and there probably would have been no appeal but for the fact that the trial judge, after reserving decision at the close of the evidence on McCullough's motion for a directed judgment of acquittal, seems to have thought it would be a good idea to listen to the summations before making up his mind whether or not to exonerate McCullough. After the summations the jury was dismissed for the day and, at a conference in the robing room, the trial judge announced that he granted McCullough's motion for acquittal on the ground that the evidence was insufficient to support a finding beyond a reasonable doubt of intent to defraud. In substance the ruling was that the rather considerable amount of misrepresentations, destruction and alteration of records and so on by McCullough was to protect his job and not to defraud the Telephone Company. This was very likely true, as there is no proof that McCullough was paid anything by Fincke and Prata. Indeed, the only way they seem to have paid anyone was by farming out their credit cards, which is euphemistically referred to as "authorizing" the use of the cards by various persons. But the ruling acquitting McCullough is not before us.

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1. Fincke received a suspended prison sentence of one year, was placed on two years' probation, and fined $7,500. Prata received a sentence of two years' probation, with the imposition of prison sentence suspended, and a fine of $2,500.

Appendix II—Opinion of the United States Court of Appeals for the Second Circuit

I.

The Acquittal of McCullough After the Summations and Before Instructing the Jury.

Counsel for appellants vigorously protested and promptly moved for a mistrial. After considerable discussion this motion was renewed and later was denied. Incidentally, despite the prolonged debate of various points raised by counsel for appellants, the motion for a mistrial is the only motion made by him and it presents the only clear question of law now before us. All the rest of counsel's protest resolves itself into a variety of miscellaneous arguments, none of which matured into rulings on motions or the denial of any request for instructions to the jury, but which do have a bearing on the question of whether or not the denial of the motion for a mistrial constituted an abuse of judicial discretion. We shall come back to this later.

It is well to bear in mind that the summations were concluded in the late afternoon of February 19, 1970 and, immediately after the jury had been excused for the day, the trial judge announced the granting of McCullough's motion for acquittal. After the protest of counsel for Fincke and Prata and his motion for a mistrial, there was considerable discussion. The last thing Judge Lasker did before the overnight recess was to make the following comment to counsel for Fincke and Prata:

> You can review your notes tonight and if tomorrow morning you wish me to give any special instruction

> that is caused by the turn events has [sic] taken, I will certainly consider it and probably grant it * * *.

There was further prolonged discussion the following morning, not in the presence of the jury. The upshot was that, having had ample time to consider the terms of a formal motion to strike parts of McCullough's testimony or submit a series of clear and precise requests for instructions, counsel for appellants produced nothing but a few additional arguments and protests. Later he did submit orally two or three requests, all of which were granted, including the request that the trial judge inform the jury of the fact that McCullough had not pleaded guilty.

We think the best way to clarify the whole situation is to review the various contentions of counsel for appellants made in the robing room out of the hearing of the jurors, with our comments.

The trial judge was adamant in his refusal to tell the jury that he had acquitted McCullough and that he had done this on the ground of lack of criminal intent. Indeed, he gave the most positive direction that the acquittal of McCullough be kept secret, and all agreed. The ruling was that he would tell the jury that McCullough was no longer in the case, that the scheme to defraud and the conspiracy charges no longer concerned McCullough but only Fincke and Prata. We think the trial judge ruled correctly. The disposition of McCullough's case had no legal bearing on the question of the guilt or innocence of Fincke and Prata. To have made a full explanation of just what had occurred would have gravely prejudiced the Government's position and it is far from clear that such an ex-

planation would not have hurt Fincke and Prata more than it helped them.

On the other hand, this alteration of the whole complexion of the case after rather than before the summations presented problems. For the theory generally applicable to trials, civil as well as criminal, especially since the adoption of the Federal Rules of Civil and Criminal Procedure, is to let counsel know in advance of the summations the rulings to be made in the instructions to the jury. *Wright* v. *United States*, 339 F.2d 578 (9th Cir. 1964); *Downie* v. *Powers*, 193 F.2d 760 (10th Cir. 1951); *Ross* v. *United States*, 180 F.2d 160 (6th Cir. 1950), *cert. denied*, 344 U.S. 832 (1952). This is generally accomplished by colloquy or by rulings on requests for instructions, prior to the summations.

Judge Lasker suggested that counsel for Fincke and Prata make an additional summation. This suggestion was wisely rejected, we think, for a variety of reasons.

There was extensive discussion between the court and counsel relative to the proofs of what McCullough had done, including his various misrepresentations, destruction and alteration of records. Here the views of the trial judge and Government counsel as well were clear and explicit, and we agree with them. This evidence was properly in the case and was admissible against Fincke and Prata, even if McCullough had no intent to defraud, as the jury could find that McCullough was an innocent agent of Fincke and Prata in carrying out their fraudulent scheme. If McCullough had testified as a Government witness, his testimony would have been relevant and admissible.

18 U.S.C., Section 2 (1964), specifically referred to in the indictment, provides:

> *Principals.*
>
> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Thus the case had a certain ambivalence from the beginning. In other words, as recognized by the able and experienced trial counsel for appellants in his summation prior to the exoneration of McCullough, and as commented upon by the trial judge several times during the trial, the Government had "to take both positions" as against Fincke and Prata, i.e., (1) that McCullough as a participant in the scheme to defraud aided and abetted Fincke and Prata by giving them further and further opportunities to use their respective credit cards, or (2) that McCullough was the innocent victim of Fincke and Prata who willfully caused him to do what he did. While these theories were not spelled out in detail in the instructions to the jury, both sub-sections of 18 U.S.C., Section 2 were read to the jury in full.

From any standpoint it is clear to us that McCullough's testimony in its entirety was properly received in the first place, as relevant to issues affecting all parties to the case,

and this same testimony was properly permitted to remain in the case after the exoneration of McCullough. To bring the detail into focus, it must be understood that there were two features of McCullough's testimony: (1) his admitted lying to his superiors and his alteration and destruction of records, and (2) by far the greater part that related to the many long conversations with Fincke and Prata at which they produced piles of documents and badgered and beguiled McCullough into permitting the continued use of the credit cards. Of course, either before or after McCullough's exoneration, the last thing in the world counsel for Fincke and Prata wanted to do was, in the presence of the jury or otherwise, to emphasize the predominant feature of McCullough's testimony, which was most damaging to Fincke and Prata. Instead, stating that he could not "pinpoint" the specific portions of McCullough's testimony that he wanted the judge to strike from the record, counsel indicated that he thought McCullough's confession of his wrongdoing would be very prejudicial to Fincke and Prata if left in the case after McCullough's acquittal.

But, viewed in its relationship to the issues both before and after McCullough's acquittal, and viewed in the light of the various views that might be entertained by the jury on questions of credibility, we think the testimony of McCullough in its entirety was properly left in the case. This testimony in its entirety was, before the acquittal, relevant: (a) to McCullough's defense to the effect that he was an innocent victim of Fincke and Prata and not a willful participant in any scheme to defraud; (b) to the Government's claim that, taking McCullough's testimony

as a whole, his conduct was so bad that he must have been getting something on the side and that he was guilty; (c) that, in any event, the way Fincke and Prata pursued McCullough, misrepresenting a variety of deals big and small for five long years and more showed what slick operators they were and proved their guilt, especially as they must or should reasonably have known that McCullough was getting desperate and might well have to cover up his permission to them to continue to use the credit cards by lying to his superiors and by altering or destroying records; and (d) to the claim by Fincke and Prata that they persuaded McCullough not through guile but because they really did have some deals on the fire.

After the acquittal (a) and (b) were out, as McCullough was no longer in the case; (c) and (d) remained. The misconduct of McCullough was part of the general picture. In any event, if counsel for Fincke and Prata desired to move to strike a particular part of McCullough's testimony, he was required to "pinpoint" that particular part so that the judge might intelligently rule on the motion. Moreover, the overnight recess gave counsel plenty of time to prepare a formal motion which he never did.

There was no amendment of the indictment by the trial judge nor could his instructions to the jury be fairly construed as permitting an inference of fraudulent aiding and abetting on the part of McCullough.

So, we come at last to the only real point in the case. Should the motion for a mistrial have been granted as a matter of law? And, if not, was it an abuse of discretion to deny the motion?

II.

The Motion for a Mistrial Was Properly Denied.

A.

Appellants argue that there was a *per se* violation of Fed. R. Cr. P. Rule 29(b)[2] and that a trial judge, having reserved decision on a motion for acquittal, must grant the motion before the summations or wait until after the jury has rendered its verdict or has disagreed. While the Rule is ambiguous, we think the phrase "submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict" is susceptible of the meaning that, in the event that the case is submitted to the jury, the trial judge may decide the motion at any time before or after the jury returns a verdict or after the jury has been discharged for failure to agree upon a verdict. After the summations and before the instructions to the jury was "at any time before the jury returns a verdict." This reading gives the trial judge ample power to grant a reserved motion for the acquittal of a defendant in a criminal case at such time, before or after the submission of the case to the jury, as the endless variables in the circumstances of particular cases make it

2. Rule 29. *Motion for Judgment of Acquittal.*

(b) RESERVATION OF DECISION ON MOTION. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.

in the judgment of the trial judge, desirable to do so in the interest of justice. Moreover, Fincke and Prata would have been in the same position if, after instructing the jury, but before the jury had rendered a verdict, the trial judge had granted the motion to acquit McCullough.

The extensive powers of the trial judge in the federal judicial system form one of the most distinctive and significant features of that system. The federal trial judge is the most important single individual in the whole hierarchy. His powers are considerably more extensive than those of most if not all state trial judges. One of the great purposes of the Federal Rules, both Civil and Criminal, is to keep these powers intact and to afford the general flexibility necessary to attain justice, to the end that such powers may be exercised fearlessly, conscientiously and impartially.[3] It is our function in the Courts of Appeals to see to it that these powers are not abused.

Thus, while we do not suggest that the course followed by the district judge here is a desirable one, we do hold that he had the power to grant the motion for the acquittal of McCullough after the summations and before giving his instructions to the jury. We now address ourselves to the wholly different question, whether this action was an abuse of discretion because it was prejudicial to the rights of appellants.

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3. See Selected Writings of Arthur T. Vanderbilt, edited by Fannie J. Klein and Joel S. Lee, The Institute of Judicial Administration, Inc. (1967), "The Attributes and the Selection of Judges," Vol. 2, p. 111 ff.

B.

This is no complicated conspiracy case such as we often have to deal with. The records of the Telephone Company disclose the thousands of telephone calls stemming in many widely separated parts of the United States from the use of the credit cards issued to Fincke and Prata. While they may have expected in 1962 or thereabouts to construct some buildings in Puerto Rico or Panama, their financial plight after the building where they had their office on Broad Street, New York City, was torn down, was not such as to inspire confidence. McCullough testified they did not even have a telephone instrument in their small new office. They had no money, they had no property, creditors other than the Telephone Company sued them and the Sheriff appeared to clean them out. But they did have the credit cards; and, as the bills piled up at the rate of $2,000 or $3,000 a month, the only way Fincke and Prata could keep going was to persuade McCullough to let them continue to use the credit cards. And this they were able to do until, in April, 1967, McCullough's superiors discharged McCullough and informed Fincke and Prata that the cards were cancelled and that any further use of the cards would be fraudulent. Even this did not deter Fincke and Prata from further use of the credit cards to the extent of an additional several thousand dollars of indebtedness. In the application to the Telephone Company, Trans American Industries, Incorporated was represented as a prosperous company with an account "in high 6 figures" in the Irving Trust Company and 33 acres of land in Toronto "to be used for Expo '67" and so forth. In fact

they never had an account of any kind in the Irving Trust Company and nothing further was heard of the land in Toronto. When the able prosecutor referred in his summation to Fincke and Prata as "a pair of confidence men" the trial judge ruled that this was "a fair commentary," and we agree.

Neither Fincke nor Prata testified in his own defense and the trial judge, at the request of their counsel, admonished the jury that they had an absolute right to abstain from testifying and that the jury was not "to give any weight or consideration to the fact that the defendants have not testified."

We think the conscientious scruples entertained by Judge Lasker had to do with the possibility that the jury might convict McCullough despite the lack of any proof that he derived any benefit whatever from his extensions of time to Fincke and Prata. It would have been easy to let the case go to the jury as against all three defendants and await the outcome. If the jury convicted McCullough, Judge Lasker could still set the verdict aside and acquit McCullough. But perhaps the thought occurred to Judge Lasker that nothing he could do would remove the stain of the conviction. Perhaps he thought McCullough had suffered enough. So he waited to hear the summations.

How different would or could have been the summation of counsel for Fincke and Prata if the trial judge had granted the motion to acquit McCullough before the summations? He certainly would have been under no obligation, legal or otherwise, to explain to the jury his reasons for acquitting McCullough. Except for the elimination of

McCullough as a defendant and alleged co-conspirator, the case would have remained just as it had been.

We have studied with care all the summations and we cannot find any substantial basis for concluding that the summation of counsel for Fincke and Prata would or could have been substantially different from the summation as made before the acquittal of McCullough.

Accordingly, taking into consideration the case as a whole, we find it was not an abuse of judicial discretion to deny the motion for a mistrial.

This, however, is not to be taken as a blanket approval of any practice of withholding decision on a motion to acquit one of several defendants charged with fraud and conspiracy until after the summations by counsel for each of the defendants and then granting the motion for acquittal before instructing the jury. Generally—indeed almost always—it will be better for the judge not to adopt the procedure followed in this case.

We have considered all the various miscellaneous contentions of counsel for appellants. We think there is no occasion for further comment as we find no merit in any of them.

Affirmed.

Appendix III

Judgment of the United States Court of Appeals for the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of February one thousand nine hundred and seventy-one.

Present:

Hon. HAROLD R. MEDINA,
Hon. STERRY R. WATERMAN,
Hon. WILFRED FEINBERG, *Circuit Judges.*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RICHARD F. FINCKE, *et al.*,
Defendants,

RICHARD F. FINCKE and ALBERT A. PRATA,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

[SEAL]

A true copy,
A. Daniel Fusaro, Clerk

Appendix IV

Indictment

69 Cr. 549

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

RICHARD F. FINCKE, ROBERT G. MCCULLOUGH and ALBERT A. PRATA,

Defendants.

Introduction

1. From on or about the 5th day of November, 1961, up to and including the 10th day of April, 1967, Robert G. McCullough, defendant was District Manager in charge of the Broad Street office of the New York Telephone Company.

2. From on or about the 1st day of July, 1958, up to and including the 2nd day of December, 1964, Richard F. Fincke and Albert A. Prata, defendants, controlled the affairs of a business operating under the name Trans American Industries ("Trans American"), located at 125 Broad Street, New York, New York. It was the purported busi-

ness of Trans American to build low cost prefabricated housing in the Republic of Panama and in Puerto Rico.

3. On or about the 2nd day of July, 1958, Trans American obtained from the New York Telephone Company business telephone service using the telephone number 422-0010, and Bell System credit cards bearing such number which were issued to, among others, Richard F. Fincke and Albert A. Prata, defendants.

4. From on or about the 1st day of October, 1962, up to and including the 10th day of April, 1967 in the Southern District of New York and elsewhere, Richard F. Fincke, Robert G. McCullough, and Albert A. Prata, the defendants, unlawfully, wilfully and knowingly did devise and attempt to devise a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises from the New York Telephone Company.

5. It was a part of said scheme and artifice that Richard F. Fincke and Albert A. Prata, defendants, would make and cause others to make numerous telephone calls in interstate and foreign commerce which would be charged to the aforesaid Bell System credit card number 422-0010.

6. It was further a part of said scheme and artifice that Richard A. Fincke and Albert A. Prata, defendants, would not pay and would not cause Trans American to pay to the New York Telephone Company the charges for such telephone calls which amounted to approximately $146,000 on April 10, 1967.

7. It was further a part of said scheme and artifice that Robert G. McCullough, defendant, would take personal charge of the Trans American account with the New York Telephone Company and would improperly and corruptly intervene in the servicing of the Trans American account in order to make available to Richard F. Fincke and Albert A. Prata, defendants, unlimited long distance telephone service without charge to them.

8. It was further a part of said scheme and artifice that Robert G. McCullough, defendant, in order to conceal from the New York Telephone Company the true status of the Trans American Account, would make and cause others to make false, fictitious and fraudulent entries in certain records of the New York Telephone Company and would destroy and cause to be destroyed other such records.

Counts One through Eleven

The Grand Jury charges:

9. Each and every allegation of the Introduction is hereby repeated, realleged and incorporated by reference in each of Counts One through Eleven of this Indictment as though more fully set forth therein.

10. On or about the dates hereinafter set forth, in the Southern District of New York, Richard F. Fincke, Robert G. McCullough and Albert A. Prata, the defendants, unlawfully, wilfully and knowingly, and for the purpose of executing said scheme and artifice to defraud did transmit and cause to be transmitted by means of wire and radio communication in interstate and foreign commerce, as

hereinafter set forth, certain signs, signals and sounds to wit, telephone conversations:

Count	*From*	*To*	*Date*
1.	Richard Fincke Weston, Ontario	Ellinger's Warehouse New York, N.Y.	5/10/67
2.	Richard Fincke Toronto, Ontario	Ellinger's Warehouse New York, N.Y.	5/12/67
3.	Richard Fincke Toronto, Ontario	Egeth & Wallach New York, N.Y.	5/11/67
4.	Richard Fincke Toronto, Ontario	Egeth & Wallach New York, N.Y.	5/26/67
5.	Richard Fincke Toronto, Ontario	Personnel Aides New York, N.Y.	5/10/67
6.	Richard Fincke Montreal, Quebec	Irene Barrett New York, N.Y.	4/8/67
7.	Richard Fincke Washington, D.C.	Personnel Aides New York, N.Y.	5/14/67
8.	Albert Prata New York, N.Y.	Ann Pasker Havertown, Pa.	5/16/67
9.	Albert Prata New York, N.Y.	Ann Pasker Havertown, Pa.	5/17/67
10.	Albert Prata New York, N.Y.	Ann Pasker Havertown, Pa.	5/26/67
11.	Richard Fincke Havertown, Pa.	Florian Yandel Spring Valley, N.Y.	4/3/67

(Title 18, United States Code, Sections 1343 and 2.)

Count Twelve

The Grand Jury further charges:

1. From on or about the 1st day of October, 1962, up to and including the 18th day of December, 1968 in the Southern District of New York, Richard F. Fincke, Robert G. McCullough and Albert A. Prata, the defendants, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other, and with others to the Grand Jury known and unknown, to commit certain offenses against the United States, to wit, to violate Section 1343 of Title 18, United States Code.

2. It was a part of said conspiracy that the defendants would and did devise a scheme and artifice to defraud as set forth in Paragraphs One through Eight of the *Introduction* to this Indictment.

3. It was further a part of said conspiracy that Richard F. Fincke, Robert G. McCullough, and Albert A. Prata, the defendants, unlawfully, wilfully and knowingly and for the purpose of executing such scheme and artifice, would and did transmit and cause to be transmitted by means of wire and radio communications in interstate and foreign commerce certain signs, signals and sounds, to wit, telephone conversations.

Overt Acts

In pursuance of said conspiracy and to effect to objects thereof, the following overt acts, among others, were committed by defendants in the Southern District of New York:

Appendix IV—Indictment

1. On or about the 11th day of March 1967, Robert G. McCullough, defendant, had a conversation with one Donald Taliaferro.

2. On or about the 21st day of March 1967, Robert G. McCullough, defendant, had a conversation with one Donald Taliaferro.

3. On or about the 11th day of March, 1967, Robert G. McCullough, defendant made a telephone call.

4. On or about the 3rd day of April, 1967, Richard F. Fincke, defendant, made a telephone call to the Southern District of New York.

(Title 18, United States Code, Section 371.)

Foreman

ROBERT M. MORGENTHAU
United States Attorney